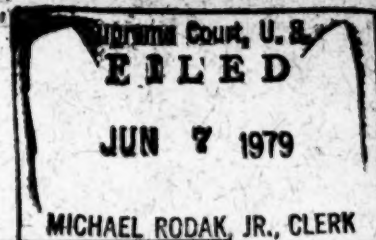


No. 78-1756



In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF CLAIMS**

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Respondents express surprise (Br. in Opp. 5) that the United States did not "discuss or even mention the Indian Claims Commission Act in its petition for certiorari * * *," and they more than make up for our omission by extensively rehearsing the legislative history of Section 24 of that Act, 28 U.S.C. 1505, in an attempt to defend the judgment below. But respondents' reliance on this statute is misplaced.

Section 1505 was enacted to afford Indian Tribes the same opportunity to sue the United States in the Court of Claims that had been afforded previously to individual litigants by 28 U.S.C. 1491. The purpose of 28 U.S.C. 1505 is to assure that each Indian Tribe is

entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to

the same defenses * * * as in cases brought in the Court of Claims by non-Indians under Section 145 of the Judicial Code (36 Stat. 1136 [now 28 U.S.C. 1491], as amended.

H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945). Accordingly, when this statute was first enacted, it contained the following provision (60 Stat. 1055-1056):¹

In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same offsets, counterclaims, and demands, as in cases brought in the Court of Claims under * * * section 250 of this title: *Provided, however*, That nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indian tribes, bands or groups.

Since 28 U.S.C. 1505 did no more than provide a parallel jurisdictional basis for suits brought by Indian Tribes in the Court of Claims, and did not alter the "defenses, both at law and equity" of the United States, respondents' contention that this statute waived the immunity of the United States for claims based on "breach of trust" (Br. in Opp. 7) is in error. Moreover, even if respondents were correct in their contention, their reasoning is unavailing

¹This language was deleted as surplusage when Section 24 was recodified as 28 U.S.C. 1505 by the Act of May 24, 1949, ch. 139, Section 89(a), 63 Stat. 102. H.R. Rep. No. 352, 81st Cong., 1st Sess. 15-16 (1949).

for the 1465 individual litigants in this case who must prevail, if at all, under 28 U.S.C. 1491 rather than 28 U.S.C. 1505.²

2. Respondents are also incorrect in their assertion (Br. in Opp. 7) that the decision in this case is supported by "a long line of Indian cases" in the Court of Claims. Of the eight cases cited by respondents (*id.* at 8-9), seven did not even address the question whether the sovereign immunity of the United States has been waived for claims for money damages based on the theory of "breach of trust."³ The only case that did address this issue did so in dicta. *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 491 (1966). The decision in the present case is thus the first instance in which the Court of Claims has confronted and decided the question for which we now seek review.⁴

²We note also that the Court of Claims has rejected the argument that 28 U.S.C. 1505 provides a jurisdiction for tribal claimants that is more extensive than the jurisdiction under 28 U.S.C. 1491 for individuals. *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483, 489-490 (1966). See also Pet. App. 5a n.10.

³Of the seven cases in which jurisdiction was assumed by the Court of Claims without discussion, at least two (*Fields v. United States*, 423 F. 2d 380 (Ct. Cl. 1970); *Mason v. United States*, 461 F. 2d 1364 (Ct. Cl. 1972), rev'd on other grounds, 412 U.S. 391 (1973)) are best understood as cases seeking the return of money "improperly exacted or retained." See *United States v. Testan*, 424 U.S. 392, 400, 401 (1976). We noted in the petition (Pet. 7-8 n.3) that sovereign immunity is not a bar to recovery for this limited category of claims.

⁴In *Mason v. United States*, *supra*, the Court of Claims simply assumed that the payment of taxes on allotted lands was a breach of a statutory duty for which Congress intended damages to be paid. See 461 F. 2d at 1374; Pet. App. 8a-9a. Contrary to respondents' implication (Br. in Opp. 10), the question of sovereign immunity was not raised by the United States in the Court of Claims in *Mason*. While our brief in that court in *Mason* discussed the absence of

3. Respondents suggest that there are two alternative grounds for supporting the judgment below. They contend (Pet. 14-17) that the claims in this litigation are within the jurisdiction of the Court of Claims either as claims based on an implied-in-fact contract or as claims for "liquidated or unliquidated damages in cases not sounding in tort," 28 U.S.C. 1491.

Even if such claims were within the lower court's jurisdiction, that would not alone resolve whether the sovereign immunity of the United States has been waived. See *United States v. Testan*, *supra*, 424 U.S. at 400. In any event, the theory of implied contract is far too narrow to support the broad-ranging conclusion of the Court of Claims that sovereign immunity has been waived for all damage claims by allottees based on "breach of trust" (Pet. App. 6a). And respondents' reliance on the "liquidated or unliquidated damages" provision of 28 U.S.C. 1491 simply proves too much: under their proposed interpretation of this provision, sovereign immunity would be waived for essentially *all* claims against the United States and the detailed provisions of the Tucker Act thus become meaningless. We understand the decision in *Testan* to have restricted the category of claims included within the "liquidated or unliquidated damages" provision of 28 U.S.C. 1491 to claims seeking the return of "money improperly exacted or retained." 424 U.S. at 401. As we noted in the petition (Pet. 7-8 n.3), this narrow provision cannot support the broad holding of the court below in this case.

jurisdiction under 28 U.S.C. 1491 for claims based on tort, it is sufficiently clear after *Testan* that the jurisdictional reach of 28 U.S.C. 1491 and the question of sovereign immunity are distinct inquiries. See 424 U.S. at 400.

For the reasons stated here and in our petition, it is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1979